



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE HISTORIC PRESERVATION DIVISION
601 KAMOKILA BOULEVARD, ROOM 555
KAPOLEI, HAWAII 96707

APPROVED MINUTES OF THE
KAUAI/NIHAU ISLAND BURIAL COUNCIL

DATE: THURSDAY, June 4, 2009
TIME: 9:00 A.M. to 12:00 P.M.
PLACE: Queen Lili'uokalani Children's Center
Lili'uokalani Trust, Kaua'i Unit
4530 Kali Road, Lihu'e, Kaua'i 96766

I. OPENING REMARKS.

Chairman Kunane Aipoalani stated the rules for the public providing testimony to the council.

Opening Pule. Commissioner Barbara Say offered the opening pule.

Call to Order. Chairman Aipoalani called the meeting to order at 9:15 a.m.

Roll Call. Roll call of the KNIBC commissioners attendance to establish quorum as follows:

Present: Kunane Aipoalani, Chairman
Keith Yap, Vice-chairman
Dee Crowell
John Kruse
Michael Loo
Barbara Say

Excused: Sandra Quinsaat
Leiana Robinson
Presley Wann

SHPD staff: Nancy McMahon, Deputy SHPO and State Archaeologist
Phyllis Coochie Cayan, History and Culture Branch Chief

Deputy AG: Randall Ishikawa, Deputy AG
Jay Paige, Deputy AG

Guests in Attendance:

Ken Taylor
Cheryl Lovell-Obatake
Kaiulani Edem-Huff
Noelani Josefin
Mahelani Sylva
Nani Rogers

Paul Curtis
Rayne Regush
Tommy Perreira
Dana Naone Hall
Leslie Pool
Hanalei Fergestron (written)

Wilma Holi
James Alalea
Louis Kanianau Cabebe
Kehau Abad (written)
Louise Sansen

Robert Pa
Ku Kahakalau (written)
Leilani Josselin
Camille Kalama
Joan Conrow

II. APPROVAL OF MINUTES FOR MAY 7, 2009.

Motion by Michael Loo to accept the minutes of the May 7, 2009 meeting as submitted.

Seconded by Barbara Say.

Vote was unanimous and the motion passed to accept the May 7, 2009 minutes as submitted.

There were comments from the public regarding timely posting of the KNIBC approved minutes to the SHPD website. Staff will follow up.

III. BUSINESS

A. Amended Burial Treatment Plan for 30 Burial Sites Identified During Inventory Survey, Wainiha Ahupua'a, Hanalei District, Island Of Kaua'i. TMK: (4) 5-8-09:45 [Brescia Property]

Information/Discussion/Recommendation: Consultation regarding the amended Preservation Component of a Burial Treatment Plan for Multiple Burials identified during inventory survey. The burials were determined to be preserved in place by the Kaua'i-Niihau Islands Burial Council (KNIBC) at its April 3, 2008 meeting. KNIBC will discuss and make recommendations (if any) to SHPD on the measures and protection of the burial sites in the final amended burial treatment plan.

Before any public testimony was heard, Chairman Aipoalani asked the folks who would be testifying to focus on the care of na iwi and not the house construction. Then the SHPD and the AG summarized some points related to this issue:

- Prior to April 2008, the landowner asked to relocate na iwi.
- In April 2008, the KNIBC voted to deny the relocation request and to leave all burials 'in situ.'
- A court order to SHPD requested further consultation with the KNIBC and other Native Hawaiian Organizations (NHO) regarding the revised Burial Treatment Plan (BTP) that is part of the Preservation in Place Plan. Note: That BTP has been revised upon SHPD's reviews to the current BTP-11. The BTP-11 was received May 28, 2009 and distributed to the KNIBC and other NHO requestors.
- Today's meeting is part of the consultation process that the department is continuing with the KNIBC and any NHO or public person who testifies today on the BTP (lists appropriate treatment for the burials).
- The department approves the BTP after consultation with the KNIBC, the landowner, and any NHO.
- The department has put this BTP-11 for the Brescia property on its website to get it out to the public. There is a two-week comment period by June 15, 2009 for the public to submit written testimony on BTP-11 to the SHPD at 601 Kamokila Blvd. #555, Kapolei, HI 96707.
- This case has had no formal determinations by the KNIBC for any lineal or cultural descendants.
- The KNIBC decision to preserve in place all burials on the Brescia property is the basis for the BTP to show that preservation plan. The department did consultation with KNIBC and others then made its decision to approve the BTP. This BTP-11 has been revised based on the department's revisions. The dates of each revision is listed in the plan as requested by some folks.
- Some letters have been received with reference to NAGPRA or Section 106 – both are federal laws and processes which this case is not. The Brescia case falls under HRS 6E (42) as these burials were found during the archaeology inventory survey (AIS).
- The KNIBC decision to preserve in place occurred about the time BTP-4 was submitted. Since then maps were corrected using GPS technology as well as other edits such as the capping of some burials. Also the last time this was on the agenda the discussion was on how treat the burials outside the house area. There were requests that there be vertical buffers (17' above and 9' above the eaves) and that there is no enclosure of the area under the house – changes like that were made in the BTP.

- The owner did not contest the KNIBC decision and worked with the BTP for preservation in place.
- The department continues to consult on this BTP and has not yet approved the BTP. The process for SHPD is to review and approve the completed AIS. Then a BTP is written to address care of any burials on the project.

Further, a power point presentation was done by the department and the office of the attorney general to review and/or familiarize everyone with maps, visuals and diagrams from the BTP-11 on the Brescia property, the 'in situ' burials and a timeline of archaeology work done there. Mike Dega of SCS who did the latest archaeology work also commented on the presentation.

PUBLIC TESTIMONY

1. Wilma Holi read and submitted a written testimony from Mr. Eddie Ayau of Hui Malama I Na Kupuna O Hawaii Nei (HMNKHN) which objects to BTP-11.
2. Wilma Holi also testified as a possible lineal descendant (in October 2008 she asserts there was no genealogist to submit her genealogy). Holi mentioned her great-great-great-great grandmother who was the then governor of Kauai Island, Muriel Kekoni and went on to speak about the responsibilities of a konohiki which is everything to keep the resources pono including burials. Holi is not in favor of the treatment of the burials at the Brescia property.
3. Rayne Regush request that the court order transcription be given to the KNIBC to review as not all of the commissioners read Judge Watanabe's ruling on the Brescia case. Regush recommended the KNIBC defer a decision till all of them has read the court transcription regarding the Brescia case as she believes the KNIBC decision to preserve in place also intended there be no house over the burials.

Note: Aipoalani stated for the record he had read the judge's ruling. Commissioner John Kruse added to the discussion that the construction of the house is continuing. Kruse discoursed on the futility of the county planning process in giving out permits and there is 'irresponsible stupidity' on all the departments and all of us here for having to deal with this problem because western law and Hawaiian values cannot mesh.

4. James Alalea testified in strong opposition to the BTP-10 and protested to Brescia being irreverent to the burials. He recommended the KNIBC not approve it as a preservation in place as a house over the burials is a desecration in place. Alalea stated a preservation in place plan means no disturbance above or below the burials. He stated there should be 24-hour access for all lineal and cultural descendants to the burials.
5. Kaiulani Edem-Huff asserted her lineage as a chiefess and how she was present from the start at the construction on the Brescia parcel. She then proceeded to read Malo's description of ancient Hawaiians practice for burials and the protocol for family members. Edem-Huff demanded that the construction of the Brescia house be halted.
6. Tommy Perreira questioned the council's and the department's authority to touch the burials and also where is the county on this issue. He was not in favor of the house being built there.

10:45 a.m. Note: Motion by Keith Yap, seconded by Barbara Say for a recess. Chairman Aipoalani noted there was a consensus to take a recess for three minutes then resume.

7. Loui Cabebe read a letter from James Huff who could not attend the meeting and who opposed the house being built over the burials. Huff also stated his concern for the burials

with future work plans for the septic tank, landscaping and fencing. Cabebe added his opposition to the record.

8. Written testimony submitted from Hanalei Fergestrom for the record. Fergestrom is in opposition to the burial treatment plan and the house being built over the burials.
9. Leilani Jossellin testified as an 'opio from Hana, Maui stating her opposition to the island burial council's process as being 'watered down and not enough kanaka maoli..."
10. Noelani Jossellin of Kapaa felt the process would set precedence in the treatment of the burials along the shoreline. She spoke about respect, caring for ancestors, and that economics is at the bottom of this issue. She was not in favor of the Brescia plan.
11. Dana Naone Hall of Maui (with many years of experience in burials, burial treatment plans and the state law) pointed out some of her objections to the BTP which include but is not limited to the following items:
 - a. The department's letter accepting the AIS notes 600+ years in carbon dating and yet only criteria D (significant information/data recovery) and E (cultural value) is used. The AIS letter should have also included criteria A (association with events, past history) as this is a significant site.
 - b. Table 3 (table 2 in the AIS) does not give the depth of the burials. Information that is necessary to create vertical buffers and this shows inaccurate information.
 - c. Varying depths in the BTP and the descriptive tables. In the AIS, no information on how many burials in the initial four trenches. Later there are 44 trenches an intense number.
 - d. The square footage of the lot varies in the report from about 15,566 sq.ft. to 18,000 sq. ft. without any explanation of the difference.
 - e. The archaeology uses a backhoe in every burial and some are disarticulated by the machinery rather than go slowly by hand once a burial(s) is found in sandy area.
 - f. Demand that the bones have a right to exist and that the KNIBC decision should be only what is best for the burials. Burials have their own inherent sovereignty anywhere in ka pae 'aina.
12. Camille Kalama, an attorney with the Native Hawaiian Legal Corporation (NHLC) [who represents Nani Roger, Jeff Chandler and Loui Cabebe] testified on some points including but not limited to the following:
 - a. The County Planning Condition #5 in the application regarding any archaeology find would cease work and notify the SHPD, the KNIBC and Planning to seek mitigation. This condition should be part of the recommendation and that the decision should not have been simply to leave or relocate the burials. Kalama said the BTP was inappropriate and the KNIBC should be making recommendations on 'appropriate treatment' now and not after the house is built.
 - b. The KNIBC should ask for all comments before making their final recommendation.
13. Mahelani Sylva testified in opposition to the burial treatment plan. Sylva demanded a complete chronology of the case. She added that the actions by the county planning should be part of the information before the KNIBC. Sylva said there should be a cease and desist on this project.
14. Louise Sansen testified this is the only place we can come and voice our issues as kanaka. She added that the site is a cemetery and she has been fighting this subdivision for over 13 years since the first house there encroached on our beach. Louise's concerns included the impacts of the yet to be built septic tank on the burials and the 'aina. Further she emphasized her kuleana to the area and to the kupuna there and that government has failed us again. Sansen wants the KNIBC to tell the department to tell the county planning that condition #5

needs to be followed. Sansen states that if the bones are removed than we have no connection to the land.

15. Jean Conrow testified that the consultation process should include the people before the BTP is written – there should be meetings with the people first. In September 2008, the judge made a ruling on consultation which the State has not involved the public in the process except for the Office of Hawaiian Affairs.
16. Nani Rogers testified that the BTP was inappropriate and that the caps should be removed and the landscaping be of native plants. Rogers opined that the rule for preservation in place means no building atop burials and that the Brescia lot is a graveyard and should be treated as such. She notes that this is BTP-11 and that indicates to her it's a flawed process with so many revisions. Rogers also demanded that Mr. Brescia show up on this item so people can talk to him face to face. Rogers recommended the KNIBC defer or reject this plan.
17. Robert Pa stated his chief status with the Kingdom of Atooi. His statements included but was not limited to the following:
 - a. The KNIBC is here to help the people. The State is not helping the people.
 - b. Concern on where the septic tank is going and its impacts on the burials.
 - c. The house should not be built over the burials and the State should not be taking over our burials.
18. Jeff Chandler testified as a descendant of the area where his grandmother Rachel Mahuiki and family are from and how their group fought against the missiles on Kauai. He shared that his family traditions include certain fishing places and that Lae O Naue is not about the leina at the point. Chandler stated that the area was an important fishing resource for his family for generations. He told the KNIBC that the evidence is in front of them and that it is difficult because you are trying to compromise and be reasonable. Chandler said there's no time for that already – it's time to take care of the iwi now by telling the Planning Department to invoke the permit now. The decision to preserve in place means you have options like no building over the burials. Chandler said he did not comply with the KNIBC mana'o regarding BTP-11.
19. Dana Naone Hall added that she is not on the Maui-Lanai Island Burials Council at this time for the record. Further the BTP does not address all the burials i.e., one fragment in trench #25 is not mentioned in the plan. Hall read the definition of a burial site as defined under HAR 13-300 adding that the BTP be revised to include ALL burials on the property.
20. Andrew (no last name indicated) offered a pule for everyone as his testimony.

12:15 p.m. EXECUTIVE SESSION

Motion by Michael Loo, seconded by Keith Yap to go into executive session to consult with its attorney on questions and issues pertaining to the Council's powers, duties, privileges, immunities and/or liabilities. There was consensus to go into executive session.

12:30 p.m. Motion by Barbara Say, seconded by Michael Loo to come out of executive session. The motion passed by consensus.

Vice-Chairman Keith Yap acknowledged the public's time and testimonies and bringing up further concerns. Yap noted that the council has some of those concerns expressed and generally it feels like the BTP is not complete as there seems to be some issues.

Yap made a motion that the SHPD reject the burial treatment plan #11 until the following issues are more clearly addressed in the BTP: 1) the plans for the septic tank; 2) access and visitation rights for any descendants; 3) vertical buffers over the burials ; and 4) not building over the burials.

The motion was seconded by Barbara Say.

Discussion on the motion included the following mana'o:

1. Chairman Aipoalani wants more clarity on what the access will be to the burials. He is uncomfortable with the idea of people going to the house at all times and feels there should be more clarity to that process. He knows there is no claims for descendancy. [Note: Wilma Hoi may put in a claim for descendancy.]
2. The department noted that the AIS mentions the plans for the septic tank and it will need a leach field.
3. Other concerns raised by the public testimony.

CALL FOR THE VOTE on the motion above. For the record, the council voted as follows:

NAME	Yea	Nay	ABSTAIN
John Kruse		x	
Dee Crowell	x		
Michael Loo		x	
Kunane Aipoalani		x	
Keith Yap	x		
Barbara Say	x		
TOTAL VOTES:	3 yeas	3 nays	None abstain

The motion is tied with three yeas, three nays and no abstaining votes. The motion fails.

12:50 p.m. Motion by Keith Yap, seconded by Barbara Say to go into executive session to consult with its attorney on questions and issues pertaining to the Council's powers, duties, privileges, immunities and/or liabilities. There was consensus to go into executive session.

1:03 p.m. Motion by Dee Crowell, seconded by Barbara Say for the KNIBC to come out of executive session. Motion passed by unanimous consensus.

Motion by Vice-chairman Yap, seconded by Barbara Say for the KNIBC to defer this agenda item regarding the burial treatment plan for the Naue parcel to allow the public to make further comments by June 15, 2008.

Discussion included but not limited to the following:

1. Carl Chipchase, an attorney for Mr. Brescia raised an objection to the deferring of the item as the time for such an action is 90 days after the plan is submitted which has long passed.
2. Counsel Jay Paige stated for the record that there was a motion with three yeas and three nays and that four votes were needed to take action on the item.
3. McMahon for the department informed the council that SHPD is here to consult for the IBC to make a recommendation on the burial treatment plan. Your recommendation is only to SHPD on the BTP. The June 15 deadline is for other Native Hawaiian organizations to make comments on the BTP to the department.
4. Deputy AG Randall Ishikawa added that the court ruled that SHPD needs to consult further with the island burials council, other Native Hawaiian organizations, and any recognized descendants on the BTP. This is a consultation on making a recommendation on the burial treatment plan. Your determination to preserve in place was made in April, 2008 and now we are in the consulting phase on appropriate treatment in the BTP.

CALL FOR THE VOTE on the motion above. For the record the council voted unanimously to defer this agenda item regarding the burial treatment plan for the Naue parcel to allow the public to make further comments by June 15, 2008.

Note: Chairman Aipoalani stated for the record the receipt of the following written testimonies submitted by individuals to the KNIBC for their consideration:

- Kehau Abad
- Pua Aiu
- Lisa Hall
- Charlie Maxwell

IV. ADJOURNMENT. The meeting was adjourned at 1:15 p.m. by consensus.

Minutes submitted by P. Coochie Cayan.....Dated: June 8, 2009 #

Note: These minutes were approved by the KNIBC at its October 22, 2009 meeting.